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Government Approval: When It's Not a Sure Bet

How can the issuance of a construction permit by one branch of government be invalidated because of community opposition?

By Virginia Trunkes | March 31, 2020

Last month's court decision ordering the removal of potentially 20 floors of a high-rise building (*The Committee For Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates*, Sup. Ct., N.Y. Co., Index No. 157273/2019) shook the local development community. How can the issuance of a construction permit by one branch of government be invalidated because of community opposition? And when can a developer rely upon final determinations of the Board of Standards and Appeals (BSA)?

The dispute involves the DOB's issuance of a permit authorizing the construction of a 55-story, 668-foot-high residential and community facility building on a development site with 110,794 square feet of lot area. The development site's "zoning lot" was created over 28 years by agreements made with contiguous neighbors to subdivide and merge land parcels and partial land parcels within the block. Each time the agreements were made, "declarations" were recorded as conveyances that established the modified tracts of land.

After the developer obtained the building permit, even though the proposed new building's dimensions complied with the requisite mathematical formulae based on the size of its zoning lot, opponents of the project contended that the permit was not validly issued because the underlying zoning lot did not comply with Zoning Resolution § 12-10(d). Section 12-10(d) defines a "zoning lot" as "a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of 10 linear feet, located within a single block, which at the time of filing for a building permit … is declared to be a tract of land to be treated as one zoning lot for the purpose of this Resolution."

One way in which such a declaration may be made is "in separate written Declarations of Restrictions covering parts of such tract of land and which in the aggregate cover the entire tract of land comprising the zoning lot," as had been the case here over 28 years. Section 12-10 also provides: "[a] zoning lot, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York, or on any recorded subdivision plat or deed."

Opponents of the project sought the permit's revocation, arguing that the 39-sided "zoning lot" assembled by "gerrymandering" over three decades was not a proper zoning lot. They claimed it was comprised of several partial tax lots, and so was neither "unsubdivided" nor "consist[ed] of two or more lots of record" as required by the ZR. In opposition, the developer urged that historically, the DOB interpreted the definition of "zoning lot" as including partial tax lots, including in a 1978 departmental memorandum that articulated the DOB's policies for implementing and interpreting the 1977 amendment to the ZR that had added subparagraph (d) to the definition of a "zoning lot" in § 12-10. The Memorandum stated that "a single zoning lot … may consist of one or more tax lots or parts *of* tax lots, as shown on the official tax map whether in common ownership or not."

In 2017, the opponents appealed to the BSA, during which time the DOB actually backtracked on its earlier interpretation of § 12-10, disavowing the 1978 Memorandum, and stated that a zoning lot should not be comprised of partial tax lots. In a split panel, the BSA, after hearing from numerous interested groups, associations and politicians, found that the development site met the definition of a "zoning lot." Its rationale was that the development site was a "tract of land" that was "unsubdivided," and thus it did not need to reach the question of whether the development site "consist[ed] of two or more lots of record."

The opponents brought an Article 78 proceeding. The developer emphasized that there were at least 34 precedents where the DOB approved zoning lots containing partial tax lots. Yet, the Supreme Court agreed with the opponents that the assemblage of a "zoning lot" through "declarations" that consist of partial tax lots contravenes the plain language of the ZR. The court vacated the determination and remanded the matter to the BSA "with instructions to review DOB's approval of the building permit application in accordance with the plain language of the ZR and in accordance with this decision and order."

The court's directive, although subtly expressed, did not sway the BSA. On remand, the BSA issued a "Revised Resolution" describing in greater detail its analysis and its determination that the opponents failed to demonstrate that the development site does not comply with the definition of "zoning lot" in ZR § 12-10(d).

The opponents again brought an Article 78 proceeding. In opposition, the developer explained the history of zoning-lot creation and how the provision in ZR § 12-10's definition of "zoning lot" that a "zoning lot, therefore, may or may not coincide with a lot as shown on the official tax map" affirms the concept that the owner has the right to "declare" a "tract of land" to be a zoning lot, without regard to tax lot boundaries. The developer emphasized the amount of construction and investment already incurred, including the enormous amount of work performed and expenditures incurred following the prior court order. Regardless, even at the time that the opponents first challenged the building permit's issuance, the developer could never have just built a "smaller tower." Any major change would require preparation of new construction plans, procurement of new financing, application for and issuance of different permits, and termination of existing contracts and entry into new ones.

Nevertheless, the court again granted the petition. This time it ordered the DOB to revoke the permit and compel the developer to remove all floors that exceed the bulk permitted under the ZR. The court reasoned that resolution of this dispute could not be achieved without determining and applying the correct definition of the term "zoning lot," which the BSA twice "sidestepped." To the court, interpreting "zoning lot" to include a composition of partial tax lots "would render superfluous the word 'unsubdivided', because if a tract of land is 'unsubdivided,' it cannot include parts of tax lots." As such, "the presence of the word 'unsubdivided' in the definition of zoning lot excludes the interpretation … improperly applied by BSA in the Revised Resolution." The court added: "Such construction of plain language … violates the public policy of transparency imbued in the zoning rules and regulations which are intended to provide proper notice and protection to the public to avoid unwarranted confusion and promote clarity in the application of these regulations to further the City's interest in ensuring zoning compliance."

As for the prejudice to the developer in having to remove multiple stories of its now-constructed building, the court declined to apply the doctrine of "estoppel." From the court's perspective, the developer "has been aware of challenges to its Permit from the start," as the opponents' first appeal was commenced as early as installation of building footings. The court added that during the first Article 78 proceeding, to avoid the possibility that injunctive relief would cause delays, the developer stipulated that it would not rely on its progress in construction and development, or its project expenditures, to justify entitlement to continue or complete construction, "including any argument premised on retroactivity, vesting rights, estoppel, mootness, laches or other equitable defenses."

The developer and city have each taken an appeal.

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